IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO.13/2002, WITH CIVIL APPLICATION NO.268/02, WITH APPEAL FROM ORDER NO.14/2002 AND CIVIL APPLICATION NO.92/2002 WITH APPEAL FROM ORDER NO.19/2002

1. Antonio Joao Hermano de Souza,
Flat No.H/G-2/3, Mahanagar
Housing Society, Madel,
Margao, Goa.

2. Maria Emilia de Souza,
H.No.134, Gomes Vaddo,
Cavelossim, Salcete, Goa.,

3. Maria Emelia Julieta Santana
de Souza, Silver Towers,
B-Bldg., Flat NO.BB2,
Near Cine Vishant, Aquem,
Alto, Margao, Goa.

4. Maria Patricia Lucia Tereza
de Souza (deceased) represented by:

4a) Mrs. Delia Almeida, wife of
Teofilo G. Almeida,
4b) Mr. Teofilo G. Almeida, husband of
Delia Almeida,
4c) Mr. John B. D'Souza, son of
Joseph D'Souza
4d) Mrs. Juliana D'Souza, wife of
John B. D'Souza,
4e) Mrs. Meena D'Souza, wife of late
Mr. Maxwell D'Souza,
4f) Ms. Tina D'Souza, daughter
of Maxwell D'Souza, represented by
her natural guardian Mrs. Meena D'Souza,
4g) Mr. Norbert D'Souza, son of
Joseph D'Souza,
4h) Mrs. Tereza D'Souza, wife of
Norbert D'Souza,
4i) Mrs. Irene D'Souza, daughter
of Joseph D'Souza,
4j) Mr. Conrad D'Souza, husband of
Irene D'Souza. .... Appellants.

V/s.

1. Shri Pedro Paul Gilbert
De Souza.

2. Smt. Adelaide M. De Souza,
Both residing at H.No. 236,

Near Cine Vishant,
Aquem, Alto, Margao, Goa. ..... Respondents.

Mr. M.S. Usgaonkar, Sr. Advocate with Mr. Sudin M.S. Usgaonkar, Advocate for the appellants.

Mr. J.P. Mulgaonkar, Advocate for the respondents.

CORAM : F.I. REBELLO, J.

DATE : AUGUST 14, 2003.

ORAL JUDGEMENT :

All these appeals and civil miscellaneous applications can be disposed of by a common order. Inventory Proceedings are pending. The estate of late Guilherme Caetano Elizario Souza and Smt. Maria Guilhermina Augusta Lourdes Aguiar Souza is the subject-matter of the inventory proceedings. Appellants No.2, 3 and 4 are the sisters of appellant No.1. Respondent no.1 is the brother. Appellant No.4 has expired and her heirs are brought on record. The subject-matter of the inventory are the properties listed under item Nos. 55, 56, 57, 58 and 59. As there could not be a settlement between the parties, the parties on 22.1.1999 moved to appoint Engineer Mr. Ernesto Muniz to evaluate the properties. On 22.2.1999, a request was made to issue notice to Engineer Moniz along with the description of the properties. On 26.2.1999, the parties prayed that Engineer Moniz be

called upon to submit his report. An inspection was fixed on 27.5.1999. Engineer Moniz submitted his report on 27.7.1999 indicating that all five items of the description were taken together and made into three plots, namely Plots No.I, Plot No.II and Plot No.III. On 21.8.1999, Counsel appearing on behalf of the appellants raised an objection that the Engineer has not shown the area of road widening of plot No.I. On 17.1.2001, the Engineer submitted that there is a road widening. Accordingly, on 21.1.2001, a report was submitted whereby the area of the Plot No.I was reduced. An auction was fixed on 28.2.2001, which continued on 1.3.2001. The appellant No.2 offered highest bid for Plot No.I and respondent No.1 offered highest bid for Plot No.II and Plot No.III. On 12.6.2001, a chart of partition was produced indicating share of each party. The owelty money to be deposited by appellant No.2 was Rs.46,51,500/- and by respondent No.1 in respect of Plot No.II and II was Rs.18,38,401.67. The appellant No.2 could not effect the owelty money and accordingly, the auction of Plot No.I was cancelled. Consequently, the appellant No.2 is restrained from taking part in the listing. The auction was ordered afresh in respect of Plot No.I. Respondent No.1 when notified to deposit owelty amount, deposited the amount of owelty in due time and the licitation in respect of Plots II and III

became complete.

On 11.9.2001, respondent No.1 made an application pleading that auction in respect of Plot No.I was cancelled, the auction respect of Plot Nos. II and III were also to be cancelled and the properties be reauctioned. Some other reasons were also given which may not necessarily be adverted to. The appellants opposed the same by their reply dated 25.9.2001. The trial Court passed the impugned Order on 6.11.2001 and allowed the application.

2. In so far as Appeal From Order No.14/2002 is concerned, as the Court declared the auction held as null and void, the respondents made an application that the owelty money deposited be released. The same was opposed to by the appellants. The trial Court, however, held that a fresh list has to be made and it would take some time and the money deposited should necessarily be released to the respondent. That the is the subject matter of the appeal.

3. In Appeal From Order No.19/2002, what is impugned is the order of 22.2.2002 whereby the application dated 22.2.2002 of the respondents for releasing the owelty money was allowed and the amount

was released to the appellants and the cheque received from the Directorate of Accounts was directed to be handed over.

4. The disposal of the controversy in appeal from Order No.13/3003 would necessarily result in consequential order in other two appeals. On behalf of the appellants, their learned Counsel contends that the grounds adduced in the application dated 11.9.2001 were not available to the party who had deposited the owelty money and consequently, the order of the trial Court suffers from an illegality. It is then pointed out that merely because the auction of Plot No.I was cancelled, by itself was no ground to cancel the auction of Plots No.II and III. Basically, it is pointed out that the procedure does not contemplate any power in the Court once owelty money is deposited, to return back the said owelty money or cancel the auction which has been done.

On the other hand, on behalf of the respondents, while supporting the order of the trial Court, it was contended before this Court by filing an affidavit that the Cabeca de Casal has not made true disclosure. It is pointed out that the property which was the subject-matter of the auction, had been sub-divided pursuant to the Cabeca de Casal having

applied for sub-division before the Margao Municipal Council. This fact, it is pointed out, was suppressed. The result of the said sub-division would be that the respondents herein would be getting lesser area than he had bided for and consequently, a fraud was played not only on the parties, but also on the Court. Consequently, the learned Court was right in cancelling the auction as null and void by order dated 2.9.2001. The trial Judge while passing the order cancelling the auction and directing fresh auction by order dated 6.11.2001 only observed that considering the replies and arguments advanced, he was of the opinion that a great injustice and prejudice would be caused to the bidder and, therefore, the auction held on 28.2.2001 was declared as null and void and directed the Cabeca de Casal to give a fresh list of assets with boundaries and survey numbers.

Under Article 2067, the person who is entrusted with the listing and presenting for description and partition the properties of the inheritance is called the administrator. Under Article 2073, the administrator shall present for the description faithfully and on oath, a list of all the properties of the inheritance. After the description is made, any party may apply that half of the income, of the

properties not bequeathed be distributed among the co-heirs. Under Article 2075, the immovable properties shall be described with reference to their boundaries, names and numbers, appurtenances and easements, and whenever they devolve in preferential manner, the improvements which were introduced therein and which were separable shall be listed. Under Article 1416 of the Portuguese Civil Procedure Code, the chart of partition has to be drawn up within eight days. What is to be included in the chart is then set out. Under Article 1417-(c), it is provided that those who have not taken the properties in licitation and who are to be allotted the owelty money due by those who were successful in the licitation, shall be notified to demand within three days, if they so desire. If the demand is made, the successful bidder shall be notified to deposit the amount failing which the licitation will be of no effect. In the instant case, the appellant No.2 on demand being made, failed to deposit the amount. Respondent No.1 on demand being made, deposited the amount.

My attention was invited to Article 264 of the Portuguese Civil Procedure Code which provides that it is for the parties to institute and to take subsequent steps in the proceedings, but the parties have the duty

of consciously not making unjust prayers, not to plead facts contrary to truth and not to takes steps that are mere dilatory. Power is conferred upon a Judge to suo motu order the steps and acts which he deems necessary for the discovery of truth. Under Article 266, it is set out that the justice should be prompt and it is the duty of the Judge to remove all the impediments to the normal progress of the case by refusing what is impertinent and dilatory or by ordering what is necessary for the progress of the case.

5. The ground now urged before this Court, on behalf of the respondents is that a fraud was practised by suppressing that the property was sub-divided and not disclosing either to the Engineer who made the plots or to the Court. This ground was not a ground raised in so far as the application dated 11.9.2001 is concerned. Under Article 1418, after the chart is drawn, the parties may apply for any rectification or raise any objection against any irregularity, namely against inequality of the lots or against non-compliance of the order directing the partition. This was not the ground raised before the learned Judge. Even if the grounds, as raised now, are considered, it would be clear that it is based on the contention that there was a sub-division and considering the sub-division the area which the

respondent No.1 would be getting would be lesser than what he had taken on auction. The auction was based on the city survey records. The letter of 31.7.1976 by the Chief Officer, Margao Municipal Council was only giving no objection to the sub-division proposed in the application dated 22.6.1976. There is nothing on record to show that based on the application of the sub-division and the provisional no objection whether any further steps were taken for sub-dividing the property. It would, therefore, be clear that even if the provisional permission was given, in the absence of it becoming final, it really cannot be said that any fraud was practised on the Court as the sub-division was done based on the inspection of the parties and based on the City Survey. It is pointed out on behalf of the appellants that presently, a road has already been constructed, fronting the property and that being the case, it really cannot be said that there was any fraud.

Considering the above, in my opinion, therefore, the trial Court acted without jurisdiction in cancelling the auction. There was no such power to cancel the auction once the auction was held. It is true that there is power in the Court, if any fraud is practised, to recall such orders. This is not such a case.

6. Coming to the appeal from Order No.13/2002, on behalf of the appellants, their learned Counsel pointed out that the said order should not be interfered with as owelty money will have to be redetermined. That is possible if the appellant No.2 did not deposit the owelty money in respect of Plot No.I, which was taken by appellant No.2 on auction and to that extent is possible that the owelty money will have to be redetermined. In case, a party who bids in an auction, does not deposit the owelty money than such a person is barred from participating in future auctions. On a party accepting the auction and depositing the money, there is no provision that in the event another party does not deposit the amount, to direct the other party to take back the money. In the instant case, no doubt, the order was passed based upon the fact that the first auction was a nullity at law. That order having been set aside, the owelty money returned, will have to be deposited. The learned Counsel tried to contend that he can be asked to deposit the money only after redetermination of the owelty money. In my opinion, that would not be a correct position, as redetermination of the owelty money would mean that the appellants can participate in an auction without depositing the money which he had to deposit. If such a party does not deposit, they will be debarred from participating in the

fresh auction to be held. Even otherwise, the contention of the appellants cannot be accepted as when the chart is prepared, owelty money has to be deposited in terms of that chart. If one does not deposit, it is open for redetermining the chart. That does not mean, however, that successful bidder is given time to deposit the owelty money until the final chart is drawn up. Considering that, the impugned order will have to be set aside.

As the impugned orders have been set aside, the subsequent order made on 22.2.2002 which has been the subject matter of Appeal From Order No.19/2002, also will have to be set aside. Respondent No.2 is however, granted time of eight weeks to deposit the money before the lower Court. The appeals along with the Civil Applications are disposed of with no order as to costs.

F.I. REBELLO, J.

ssm.